

place. That noncompliance is aggravated by the fact that TracFone continued to ignore the obligation to provide the PaPUC with relevant filings, including the TracFone Modification Petition and the December Supplement.¹⁶

43. We rescind our ETC Designation for Pennsylvania and direct TracFone to proceed with all deliberate speed to transition wireless Lifeline customers to other wireless Lifeline service providers currently designated to provide similar Lifeline service to lower-income Pennsylvanians in Pennsylvania.

44. TracFone is prohibited from continuing or expanding its services in contested jurisdictions (again Pennsylvania) until we further resolve the pressing issue of forbearance from the facilities requirement. This includes the outstanding issues on the process for certifying compliance with state laws and the process for managing PSAP certification. We intend to resolve those issue in the Facilities Forbearance NPRM issued today.

45. However, for jurisdictions other than Pennsylvania that have not demonstrated noncompliance with the conditions outlined in the *April 2008 ETC Order*, we see no need to reach a different result on ETC Designations for TracFone different from that determined in that *April 2008 ETC Order*. This is warranted by the paucity of evidence on allegations about TracFone's behavior in those jurisdictions compared to Pennsylvania.

46. Moreover, we actively solicit comment and reply comments on whether, and how, forbearance petitions on the Section 254(b) ownership obligation and the ancillary FCC regulations should be considered and granted. We also seek comment and reply comments on our ETC Designation determinations made under Section 214(e)(6). Finally, we solicit comments and replies on any other related matters identified by a party.

47. *The Virgin Mobile ETC Designation Petitions.* Virgin Mobile requests ETC designation in several jurisdictions under Section 214(e)(6). We conclude that ETC designation is appropriate for the requested jurisdictions except Pennsylvania. The PaPUC's recent assertion of jurisdiction warrants dismissal

¹⁶ TracFone relied on our prior action granting ETC Designation to Nextel in Pennsylvania by Order issued August 25, 2004 even though Paragraph 10 of that Order clearly ruled that the PaPUC determination for Nextel was carrier-specific and of no precedential value and despite the fact that Paragraph 113 of our *12th Report and Order* directed carriers to consult with the state commission and to not rely on prior state commission determinations issued to similarly situated carriers. TracFone also failed to comply with our January 8, 2008 directive to provide the PaPUC with a copy of their ETC Designation petition. This procedural noncompliance is not the only instances where noncompliance supports rescission of ETC Designation in Pennsylvania given TracFone's apparent inability to meet FCC mandates and conditions.

without prejudice with instructions to re-file the petition at the PaPUC using the process and expectations we set out in the *April 2008 ETC Order* for the State of Florida. The PaPUC, like the Florida PSC, asserted jurisdiction and under the “primary jurisdiction” precedent, we will dismiss the matter without prejudice.¹⁷

C. The TracFone Modification Petition.

48. We deny TracFone’s Modification Petition. TracFone’s problems with PSAP certification in multiple jurisdictions is largely unsubstantiated and relies on anecdotal evidence. TracFone recognizes that Georgia granted PSAP certification for far more PSAP operators than it denied.¹⁸ The fact that TracFone has problems with a few of the remaining PSAP operators does not necessarily establish that Georgia is acting unreasonably, arbitrarily refusing to grant PSAP certification, or capriciously revoking PSAP certifications previously granted.

49. The holds true for the other jurisdictions identified in TracFone’s filings, most particularly for Pennsylvania in light of the PaPUC and PEMA filings. TracFone had ample opportunity to refute the facts and documents supporting those regulatory bodies concerns with TracFone. The fact that TracFone failed to do so is not a problem with state law or state regulators but reflects, instead, a problem with TracFone’s ability to comply with reasonable FCC mandates.

D. The PEMA Rejection Petition.

50. We grant PEMA’s Petition to Reject TracFone’s Self-Certification that it is in compliance with Pennsylvania law. This condition was imposed on TracFone in the *April 2008 ETC Order* as a critical component that ensured that TracFone was actually in compliance with state law.

51. While we reject the PaPUC’s ancillary claim that the *April 2008 ETC Order* did not include Pennsylvania, the PaPUC outlines several

¹⁷ We note that Virgin Mobile’s ETC Designation Petition for Pennsylvania filed in December 2007 relies on the PaPUC’s carrier-specific decision made to refrain from exercising jurisdiction over NEP’s ETC petition even though we never granted the NEP Petition until May 1, 2008 and despite the fact that Paragraph 113 of the *12th Report and Order* directing carriers to consult with state commissions and not rely on previous state commission determinations made for similarly situated carriers. To the extent this noncompliance retains any relevance, we consider this noncompliance to be a solid basis for denying Virgin-Mobile ETC Designation if we were to act, which we need not do given Pennsylvania’s action.

¹⁸ TracFone Modification Petition, p. 7. TracFone concedes that it secured PSAP certification in 137 out of 164 PSAPs in Georgia.

anomalous and disturbing procedures that lead to including Pennsylvania within the ambit of our *April 20008 ETC Order*.

52. Those anomalies left the Commission with two options. The FCC could have found that Pennsylvania was not included despite extensive discussion about Pennsylvania in that order. That requested result was reasonable but ultimately unpersuasive given that the major concern of the PaPUC and PEMA appears to be TracFone's compliance with the conditions attached to ETC Designation. Their filings amply demonstrate that TracFone's problems are largely self-created, are substantial, and cannot be rectified by a revocation premised on procedural anomalies.

53. We conclude that revocation of ETC Designation in Pennsylvania is better premised on the factual record outlined in the PaPUC and PEMA filings. This includes inconsistent statements about what whose facilities are being used to provide 911, contradictory commitments on testing made to the counties charged with certifying PSAP compliance, and misleading refusals to address substantial compliance with FCC notice and pleading requirements. This includes the order to provide the PaPUC with a copy of TracFone's ETC pleadings, the duty to consult with the PaPUC on ETC Designation, the obligation to seek some kind of "affirmative statement" from the PaPUC addressing ETC designation, and violation of the prohibition against relying on prior "affirmative statements" made to similarly situated carriers as the basis for securing ETC designation.

E. The Tracfone Motion For Partial Dismissal.

54. For the reasons outlined in detail above, we conclude that denial of TracFone's Motion for Partial Dismissal is appropriate. TracFone limits the TracFone Motion to the PaPUC's subsequent Ex Parte letter although the PaPUC clearly reiterated other concerns in filed Comments and Reply Comments as well.

55. TracFone misrepresents the PaPUC's concerns as focusing on a "centerpiece" reliance on "drive testing" as though that were the only issue in the proceeding. The PaPUC filings demonstrate that "drive testing" is an important and critical component of the PaPUC's concerns but is it far from the only one. The PaPUC raised substantial concerns about significant noncompliance with FCC notice and pleading requirements. The PaPUC amply documented TracFone's practice of making inconsistent statements, misleading commitments on important

issues like testing, and providing contradictory information on what facilities TracFone would use to deliver supported Lifeline Service in Pennsylvania.

56. We see no reason to grant the TracFone Motion given the factual considerations outlined in this Order and Notice of Proposed Rulemaking.

IV. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Section 214(e)(6) and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc. IS NO LONGER DESIGNATED AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER in the Commonwealth of Pennsylvania.

58. IT IS FURTHER ORDERED that, pursuant to the authority contained in Section 214(e)(6) and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc. is hereby directed to proceed with all deliberate speed to transition current wireless Lifeline eligible customers in Pennsylvania to similarly situated wireless carriers that currently are DESIGNATED AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.

59. IT IS FURTHER ORDERED that, pursuant to 47 USC § 160 and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc.'s prior forbearance granted in the *2005 Forbearance Order* is revoked upon reconsideration based on predictive effects in 2009 that substantially differ from those anticipated in 2005 in the Commonwealth of Pennsylvania.

60. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), and 214 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, this FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

61. IT IS FURTHER ORDERED that Virgin Mobile's Petition for Forbearance under 47 CFR § 160 is denied consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

62. IT IS FURTHER ORDERED that Virgin Mobile's Petition for ETC Designation under Section 214(e)(6) IS DISMISSED WITHOUT

PREJUDICE to the extent consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

63. IT IS FURTHER ORDERED that the Pennsylvania Emergency Petition for Rejection is GRANTED consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

64. IT IS FURTHER ORDERED that the TracFone Wireless, Inc. Motion for Partial Dismissal is denied consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

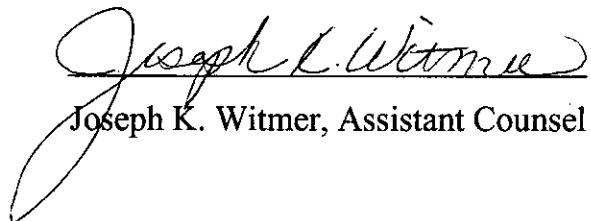
65. IT IS FURTHER ORDERED that this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING shall be effective as a final order upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas,
Secretary

CERTIFICATE OF SERVICE

I, Joseph K. Witmer, Assistant Counsel for the Pennsylvania Public Utility Commission, do certify that the forgoing Answer of the Pennsylvania Public Utility Commission was filed electronically with the Federal Communications Commission this 4th day of March, 2009 and was provided to the Movant, TracFone Wireless, Inc. and Virgin Mobile, an interested party, electronically on the same day and was followed up by United States mail, first-class, postage prepaid.


Joseph K. Witmer, Assistant Counsel

DOCKET NO.

96-45

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